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Productivity Commission Inquiry into the Regulation of Architects in Australia

6 June 2000

Comment by the Board of Architects of New South Wales, on the submission #3 by Peter Donovan, of Lindfield, NSW, dated 13th of December, 1999.

Background to the author.

The Board of Architects of New South Wales is of the view that, *in general*, submission number 3 by Peter Donovan, is seriously flawed and perhaps, according to legal advice, libellous. The Board accordingly seeks withdrawal by the Commission of this submission from the public domain.

The Peter Donovan submission has been prepared by a person who in 1995, together with co-complainant Margaret Donovan, alleged breach of the NSW Architects Act by three architects involved with the design, documentation and contract administration of a laundry outbuilding to their residence in Lindfield, Sydney.

The nature of the complaints were essentially directed at alleged poor workmanship by the builder with whom they had contracted, together with alleged lapses in the performance of the architects in their contract administration. The architects had directed the builder to rectify defective work which the Board understands the builder had failed to do.

Having received compensation for the re-building of the project under the Home Building Act through the NSW Department of Fair Trading, the Donovans then sought to persecute the architects, and also an architect who had earlier served as Expert Witness, having been called upon to provide expert evidence in litigation commenced by the Complainant at the Department of Fair Trading.

The Donovans complained to the Minister responsible for the carriage of the Architects Act who passed the complaints on to the Board for attention. The Board, following careful consideration of the complaints concluded that, in general, most were baseless, however to be sure, the Board engaged Mr Andrew Rogers QC, former Judge of the Supreme Court, Commercial Division, to advise the Board on each and every complaint.

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Numerous complaints were documented and these were aimed at two architect respondents, each being directors of an architectural company. A further architect who had acted as an Expert Witness in the dispute in the Consumer Claims Tribunal and who happened to be, at that time, President of the Board of Architects, was conjoined.

Based on the advice of Mr Andrew Rogers, QC and in accordance with the provisions of the Act, the Board refused to hear a number of the complaints being found to be frivolous or vexatious. In the event, and following a subsequent formal hearing, one complaint only (against one of the architect/directors) was upheld and the architect was reprimanded.

It is clear that in the Donovan submission to the Commission's Inquiry is from the point of view of a vexatious Complainant who, having brought the complaints before a statutory body for consideration by due process, was not satisfied with the outcome and as a result, he brings into question the objectivity of the Board and its members. There are numerous inferences and innuendos throughout the Donovan submission to substantiate this view.

The Donovan submission to the Productivity Commission Inquiry.

We would now like to respond to some of the matters raised in the Donovan submission to the Commission's Inquiry which directly relate to the Donovans' account of their experience with the Board's handling of their complaint, under the following headings —

- Complaints against the architects who were Directors of an architectural company;
- Complaints against an Expert Witness
- Allegations of lack of integrity by the Board, and its members.

The relevant extracts from the Donovan submission to the Commission's Inquiry are italicised and included herein, for reference. The facts of the Donovan complaint proceedings conducted by the Board are documented from Board records,

1 Complaints against the architect/directors.

(Donovan: Item 3 — ".....the Giles Royal Commission into the Building Industry in NSW (1993) found much evidence of collusive tendering, extortion, fraud, Intimidation, assault and perhaps even, murder. The profession of architecture must have been unpleasantly close to appalling conduct....."

Item 4.2 — "The members of the profession have a strong financial interest in maintaining general public confidence in the registered practitioners. They also have a strong financial interest in not being exposed to

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blackmail and so in having a system that prevents frivolous and vexatious complaints from doing damage. So Parliament passes an Act which empowers the members of the profession to vote for members of a statutory Board, Council or Tribunal that can handle complaints from those who care to walk in the door".

Item 4.7 — "In fact the Board, acting on the advice of a former Supreme Court Judge, accepted and ultimately upheld a complaint from us based on lack of due care and skill. So the NSW Board of Architects has been fobbing off potential complainants with bad advice about the law!"

Item 8 — "There is no visible economic incentive to spend serious money on lawyers to nail a rogue....."

Item 12 — "Companies are used by unworthy architects to make it harder for suing in tort to be successful"

The facts:

As previously stated, the Board engaged the services of a QC to assist in ensuring a fair hearing and compliance with the law. With the benefit of this advice the Board resolved, in accordance with the Act, not to hear a number of the complaints as they were deemed to be frivolous or vexatious. Two complaints were subsequently withdrawn.

One of the architect/director respondents had been involved only in the early stages of the contract administration, and some of the complaints against this architect were among those the Board decided it would not hear. However some four complaints remained to be heard and these were found to concern the other architect/director who had the carriage of the contract administration for the project.

A Disciplinary Committee was then formed and chaired by the Vice President of the Board. The other members were an architect, and a lay member, being a QC.

The Committee heard the evidence and found that three of these complaints were without foundation, and were dismissed as frivolous or vexatious and without foundation.

In connection with the fourth complaint, the builder had been instructed by the architect not to pour concrete before the foundations were inspected. The builder ignored the architect's instruction and poured the concrete. In accordance with s.17 of the Act, because he did not pursue investigations after the concrete was poured, the Board found this complaint proven in that, by wording of the Act, the architect was "guilty of improper conduct in a professional respect" and therefore in breach.

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The architect was reprimanded in accordance with the Act's disciplinary provisions.

2 Complaints against the Expert Witness.

(Donovan: Item 2.3.1 — "A member of the Board of Architects wrote an 'affidavit of evidence' to the effect that the building concerned was structurally sound and of adequate standard of workmanship. Now the builder has been delicensed, the architect principally responsible reprimanded by the NSW Board of Architects and the building replaced substantially at the cost of BSC Insurance....."

Item 4.6 — "Thus the Productivity Commission must accept that architects can and do lie to protect their colleagues."

The facts:

The Donovans alleged that in preparing a report, the architect who acted as Expert Witness "intended to deceive the Consumer Claims Tribunal".

In a meeting of the Board wherein the report and recommendations of the Disciplinary Committee were received, the Board sought advice from Mr Andrew Rogers QC on the legal problems posed by the submissions. Mr Rogers gave advice to the Board to the effect that the evidence in no way supported the allegation.

As the then President had found himself as a Respondent, and having served as the Expert Witness in the earlier litigation, he had stood down from his office at all times when the matter came before the Board.

After discussion, and based on that advice, the Board resolved not to hear the complaint because in the opinion of the Board, the complaint was vexatious.

3 Allegations of lack of integrity by the Board and its members.

(Donovan: Item 4.7 — "The Board, acting on the advice of a former Supreme Court Judge, accepted and ultimately upheld a complaint from us based on lack of due care and skill. So the NSW Board of Architects has been fobbing off potential complainants with bad advice about the law"; and

Item 8 — "It is easier to move the NSW Board to the evidence than vice versa. If one hears that the NSW Board accepts unsworn evidence from an architect who has made a cursory examination of the property ahead of highly competent building experts, further doubt arises about the wisdom of putting money, time and nervous energy into the

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matter....Note also section 4.7 above, which may be evidence that the NSW Board has been systematically discouraging complaints alleging negligence by issuing disinformation about the law"
*-*Item 9 — " The behaviour of a member of the NSW Board of Architects throws very grave doubt over the integrity of the whole organisation".*

The facts:

Whilst there was no formal complaint lodged against the Board at the time, it became clear following the hearing of the complaints that the outcome of the disciplinary hearings was not acceptable to the Donovans. This has become apparent in the submission to the Commission's Inquiry.

In respect of item 4.7, the Board is accused of fobbing off potential complainants with bad advice about the law. However it is clear that advice taken by the Board in the matter of his complaint was at its highest level, coming as it did from Mr Andrew Rogers, QC.

In respect of item 8, the Board had no need to accept evidence in respect of the Expert Witness as the complaint was not substantiated with any form of evidence. Again, on the advice of Mr Andrew Rogers QC, the Board refused to hear the complaint.

In respect to item 9, no evidence was produced to substantiate any wrong doing of any member of the Board. This wild accusation is an example of the type of complaint received by the Board from Mr and Mrs Donovan.

In general:

There is criticism by Mr Donovan that architects recommend a form of building contract which is not in the best interests of the client.

Whilst forms of building contract are not within the purview of the Board, this matter does bear on consumer protection and in this regard, it must be said that the architectural profession has been at the forefront, as catalyst and independent professional advisers in building matters, for the evolution over decades of a series of forms of contract which are "user friendly" and fair to both the owner and the builder. The Board is supportive of these initiatives, in the public interest.

In conclusion:

In view of the foregoing, the Board requests the Productivity Commission to withdraw the submission to the Inquiry by Peter Donovan, and to discount the submission in its considerations.